

STATE OF CALIFORNIA

OFFICE OF ADMINISTRATIVE LAW

2008 OAL DETERMINATION NO. 28
(OAL FILE NO. CTU 2008-0506-01)

REQUESTED BY: Rodney Koch

CONCERNING: California Department of Corrections and Rehabilitation's
Administrative Bulletin No. 05-03 (Processing of Inmate/Parolee
Appeals Alleging Staff Misconduct or Requiring an Internal
Affairs Investigation)

**DETERMINATION ISSUED PURSUANT TO
GOVERNMENT CODE SECTION 11340.5.**

SCOPE OF REVIEW

A determination by the Office of Administrative Law (OAL) evaluates whether or not an action or enactment by a state agency complies with California administrative law governing how state agencies adopt regulations. Nothing in this analysis evaluates the advisability or the wisdom of the underlying action or enactment. Our review is limited to the sole issue of whether the challenged rule meets the definition of a "regulation" as defined in Government Code section 11342.600¹ and is subject to the Administrative Procedure Act (APA). If a rule meets the definition of a regulation, but was not adopted pursuant to the APA and should have been, it is an "underground regulation" as defined in California Code of Regulations, title 1, section 250.² OAL has neither the legal authority nor the technical expertise to evaluate the underlying policy issues involved in the subject of this determination.

FACTUAL BACKGROUND

On May 6, 2008, Rodney Koch (Petitioner) submitted a petition to OAL challenging as an underground regulation Administrative Bulletin No. 05-03 (AB 05-03) relating to processing of inmate/parolee appeals, issued by the California Department of Corrections and Rehabilitation (Department)³ on November 22, 2005. AB 05-03 sets forth how appeals by inmates or parolees that allege any staff misconduct shall be processed.

¹ Unless otherwise specified, all references are to the Government Code.

² As defined by title 1, section 250(a), an

"Underground regulation" means any guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, including a rule governing a state agency procedure, that is a regulation as defined in Section 11342.600 of the Government Code, but has not been adopted as a regulation and filed with the Secretary of State pursuant to the APA and is not subject to an express statutory exemption from adoption pursuant to the APA.

³ Formerly the California Department of Corrections, the Department was reorganized and renamed the California Department of Corrections and Rehabilitation pursuant to the Governor's Reorganization Plan of 2005.

The Department did not formally respond to Mr. Koch's petition. However, during OAL's initial review of this petition, they provided informal responses indicating that AB 05-03 was prepared and issued in conjunction with the Special Master and federal court oversight of parties to ongoing litigation in *Madrid v. Tilton*, and provided copies of a December 4, 2006 court order (*Madrid* order) and documents related to the *Madrid* order.⁴ The *Madrid* order and related documents have no bearing on this determination.

OAL received no public comments in response to this petition.

UNDERGROUND REGULATIONS

Government Code section 11340.5, subdivision (a), provides that:

(a) No state agency shall issue, utilize, enforce, or attempt to enforce any guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, which is a regulation as defined in [Government Code] Section 11342.600, unless the guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule has been adopted as a regulation and filed with the Secretary of State pursuant to [the APA].

When an agency issues, utilizes, enforces, or attempts to enforce a rule in violation of section 11340.5 it creates an underground regulation as defined in title 1, California Code of Regulations, section 250.

OAL may issue a determination as to whether or not an agency issues, utilizes, enforces, or attempts to enforce a rule that meets the definition of a "regulation" as defined in section 11342.600 and should have been adopted pursuant to the APA. An OAL determination that an agency has issued, utilized, enforced, or attempted to enforce an underground regulation is not enforceable against the agency through any formal administrative means, but it is entitled to "due deference" in any subsequent litigation of the issue pursuant to *Grier v. Kizer* (1990) 219 Cal.App.3d 422 [268 Cal.Rptr. 244].

CHALLENGED RULE

The petition alleges that AB 05-03 constitutes an underground regulation.

The express purpose of AB 05-03 is to announce changes in procedures for addressing "staff complaints" filed by inmates and parolees. Specifically, that:

All inmate complaints which allege *any* misconduct by a staff member will continue to be logged by the Appeals Coordinator (AC) as a Staff Complaint, Category 7. Procedures for processing staff complaint appeals shall be as follows. (AB 05-03, p. 1; emphasis added.)

⁴ The Department referred specifically to the federal court order in *Madrid v. Tilton*, No. C90-3094 TEH (N.D.Cal., December 4, 2006) (ordering the Department to implement specific procedures for internal affairs investigations of inmate abuse and excessive force).

AB 05-03 sets forth new procedures that require all complaints against staff to be assigned to specified Department officials for review to determine whether an Internal Affairs investigation is warranted. If an Internal Affairs investigation is warranted, the appeal is referred to the Department's Office of Internal Affairs for investigation. If an Internal Affairs investigation is not warranted, the assigned reviewer is required to interview the inmate and any other pertinent staff, inmate, or parolee witnesses, and to complete a confidential report and a "first level review" response.

AB 05-03 includes the following requirements for inmate and parolee appeals that allege any staff misconduct:⁵

1. "If an appeal alleges staff misconduct involving excessive or inappropriate use of force, the allegation will be addressed pursuant to the procedures prescribed in the Use of Force Policy (including an immediate videotaped interview, if one has not already been completed)." (AB 05-03, p. 1.)
2. "If an appeal alleges staff misconduct and also includes issues such as property complaints, disciplinary actions, etc., the Appeals Coordinator will inform the inmate/parolee in writing that the appeal will be addressed as a Staff Complaint and that the other appeal issues must be appealed separately. Appeals alleging staff misconduct will be addressed separately and will not be combined with other appeal issues." (*ibid.*; bold font omitted.)
3. "If an appeal alleging misconduct by a departmental Peace Officer is received without the Rights and Responsibilities Statement [as required by title 15, section 3084.1(e), the appeal] shall be processed [in accordance with AB 05-03] and the Rights and Responsibilities Statement shall be obtained from the inmate/parolee at the time of his/her appeal interview." (*id.*, pp. 1-2.)
4. "The Hiring Authority, or designee, shall review all staff complaint allegations and determine if:
 - a. The allegation warrants a request for Internal Affairs investigation.
...
 - b. The allegation does not warrant a request for Internal Affairs investigation. The Appeals Coordinator shall be instructed to assign the appeal for a First Level Response. . . ." (*id.*, p. 2; bold font omitted.)
5. "Appeals alleging staff misconduct that do not warrant an Internal Affairs investigation ... will be handled in the following manner:
 - [A] Confidential Supplement to Appeal, Appeal Inquiry (Attachment C), will be completed by the reviewer in addition to the First Level Review Response to the inmate/parolee.
 - The assigned reviewer will read the allegation and interview the appellant. After interviewing the appellant, any other pertinent staff or inmate/parolee witnesses will be interviewed. . . ." (*id.*, pp. 2-3.)

⁵ This is not an exclusive list of the AB 05-03 requirements.

ANALYSIS

OAL's authority to issue a determination extends only to the limited question of whether the challenged rule meets the definition of a "regulation" in section 11342.600 and should have been adopted pursuant to the APA.

A regulation is defined in section 11342.600 as:

. . . every rule, regulation, order, or standard of general application or the amendment, supplement, or revision of any rule, regulation, order, or standard adopted by any state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure.

In *Tidewater Marine Western, Inc. v. Victoria Bradshaw* (1996) 14 Cal.4th 557, 571 [59 Cal.Rptr.2d 186], the California Supreme Court found that:

A regulation subject to the Administrative Procedure Act (APA) (Gov. Code, §11340 et seq.) has two principal identifying characteristics. First, the agency must intend its rule to apply generally, rather than in a specific case. The rule need not, however, apply universally; a rule applies generally so long as it declares how a certain class of cases will be decided. Second, the rule must implement, interpret, or make specific the law enforced or administered by the agency, or govern the agency's procedure (Gov. Code, §11342, subd. (g)).⁶

The first element of a regulation is whether the rule applies generally. *Tidewater* points out that a rule need not apply to all persons in the state of California and that it is sufficient if the rule applies to a clearly defined class of persons or situations. AB 05-03 establishes a comprehensive, statewide scheme for processing inmate and parolee appeals that allege any type of staff misconduct. Inmates and parolees must comply with the procedures in AB 05-03 or risk their appeal being unresolved. Department staff must take specific actions with each appeal. Inmates, parolees, and Department staff are clearly defined classes of persons. Therefore, the first *Tidewater* element is met.

The second *Tidewater* element is that the rule must implement, interpret or make specific the law enforced or administered by the agency, or govern the agency's procedure. As provided in the Penal Code section 5054, the Department has broad authority over prison operations and inmates:

[T]he supervision, management and control of the state prisons, and the responsibility for the care, custody, treatment, training, discipline and employment of persons confined therein are vested in the Secretary of the Department of Corrections and Rehabilitation.

⁶ Section 11342(g) was re-numbered to section 11342.600 in 2000 without substantive change.

In addition, section 11180 authorizes the Department to “make investigations and prosecute actions concerning” the following:

- (a) All matters relating to the business activities and subjects under the jurisdiction of the department.
- (b) Violations of any law or rule or order of the department.
- (c) Such other matters as may be provided by law.

Accordingly, the Department is the state agency charged with the management of state prisons and the care and treatment of prison inmates and parolees,⁷ which includes processing of inmate and parolee complaints about misconduct or abuse by Department staff. Pursuant to this authority, the Department has existing adopted regulations that govern inmate and parolee appeals in title 15, California Code of Regulations, section 3084.1 et seq. These duly adopted regulations include the following:

- General inmate and parolee right for appealing grievances, including staff misconduct appeals (section 3084.1)
- Appeal preparation requirements (section 3084.2)
- Criteria for screening and rejecting appeals by an Appeals Coordinator (section 3084.3)
- Informal appeals, three levels of formal appeal review, interview requirements, and disposition of appeals (section 3084.5)
- Time limits for filing appeals (section 3084.6)
- Emergency appeals and exceptions to the regular appeals process (section 3084.7)
- Rights of inmates under the American With Disabilities Act (section 3085)

In addition to Penal Code section 5054 and Government Code section 11180, AB 05-03 further implements and makes specific the existing regulatory sections relating to appeals by requiring separate procedures for all staff misconduct appeals.

AB 05-03 sets forth a new comprehensive process for the Department’s handling of staff misconduct appeals that include:

- Interview requirements, including videotaped interviews where an appeal alleges any “excessive or inappropriate use of force”
- Requirement for Appeals Coordinators to separate appeals that allege any staff misconduct from any other issue alleged in the same appeal and to inform the inmate or parolee to resubmit the non- staff misconduct issues in a separate appeal, even if the issues are related
- Authorization for inmates and parolees to submit the required title 15, section 3084.1(e) Rights and Responsibilities Statement after filing an appeal that alleges misconduct by a departmental Peace Officer
- Automatic placement of an appeal that alleges any staff misconduct to at least a “first level review”
- Requirement for preparing a confidential report after interviewing all required or pertinent witnesses for all staff misconduct appeals

⁷ Parolees are “prisoner[s] under sentence and in the legal custody . . . of the Department [and] subject to [its] rules and regulations.” (*People v. Prochnau* (1967) 59 Cal.Rptr. 265, 269 [251 Cal.App.2d 22]; citations omitted.)

AB 05-03 establishes a wholly new comprehensive process to be used whenever any allegation of staff misconduct is raised in an appeal. Accordingly, it implements, interprets or makes specific the Department's management of state prisons and care and treatment of prison inmates, which includes processing of inmate complaints about misconduct or abuse by Department staff.

Accordingly, we conclude that AB 05-03 meets the second *Tidewater* element and, therefore, meets the definition of a regulation in section 11342.600.

The final issue to examine is whether AB 05-03 falls within an exemption from the APA. Exemptions from the APA can be general exemptions that apply to all state rulemaking agencies. Exemptions may also be specific to a particular rulemaking agency or a specific program. Pursuant to section 11346, the procedural requirements established in the APA "shall not be superseded or modified by any subsequent legislation *except to the extent that the legislation shall do so expressly.*" (Emphasis added.)

The Department did not claim, nor could OAL find, any general or specific exemption that applies to AB 05-03.

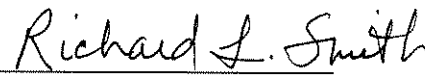
CONCLUSION

In accordance with the above analysis, OAL determines that AB 05-03 meets the definition of a "regulation" as defined in section 11342.600, is not exempt from the APA and, therefore, is required to be adopted pursuant to the APA.

September 26, 2008



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